IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 174 OF 1983

Shankar Ganpati Jagtap
(since deceased through LRs.)
1A. Yashwant Shankar Jagtap
Age: 61, Occ.: Retired.
1B. Mahadev Shankar Jagtap,
Age: 66, Occ.L Agriculture.
1C. Dattatray Sahnkar Jagtap,
Age: 63, Occ. Private Service.
1D. Vijay Gulabrao Jagtap,
Age: 30, Occ. Private Service.
All residing at Post: Kenjal,
Taluka Wai,Dist. Satara. ... Appellants.

Versus.

1. Laxmibai Ganpati Jagtap,
(since deceased through LRs.)
1A. Krishna Ganpat Jagtap
(since deceased through LRs.)
1AA.Shalan Krishna Jagtap
Age: 52, Occ.: Agriculture.
1AB.Vijay Krishna Jagtap,
Age: 39, Occ.: Agriculture.
1AC.Anil Krishna Jagtap,
Age: 37, Occ.: Private service.
1AD.Sampat Krishna Jagtap,
Age: 35, Occ.: Private service.
1AE.Manik Krishna Jagtap,
Age: 30, Occ.L Private service.
All R/o.At Post: Kenjal, Taluka:
Wai, Dist. Satara.
1B. Krishnabai Mansing Dhamal,
Age: 70, R/o.At Aasavali,
Tal. Khandala, Dist. Satara.,
1C. Subhadra Narayan Thorat,
Age: 49, R/o.at Tadvale, Tal.
Koregaon, Dist.Satara.

2. Krishna Ganpati Jagtap
(since deceased through his LRs.)
Respondents 1AA to 1AE.

3. Hari Ganpati Jagtap
(Since deceased through LRs.)
3A. Arjun Hari Jagtap,
(since deceased through LRs.)
3A(a) Sushila Arjun Jagtap
3A(b) Satsish Arjun Jagtap
3A(c) Kishor Arjun Jagtap

All R/o. Kenjal, Tal.Wai,
Dist. Satara.
3A(d) Sushma Chandrakant Ghorpade,
R/o.Room No.104, Gangapuri Ali,
Wai, Tal. Wai, Dist.Satara.
3B. Beby Uttam Jagtap
(since deceased through LRs.)
3b(a) Rajashree Shivaji Babar,
R/o.Kikali, Tal.Wai, Dist.
Satara.
3b(b) Rohini Shrikant Jadhav,
R/o.Vechale (Shendre),
Tal.& Dist.Satara.
3C. Laxman Hari Jagtap,
Age: 55, Occ.: Agriculture.
3D. Ramchandra Hari Jagtap,
Age: 52, Occ.: Agriculture.
3E. Sambhaji Hari Jagtap.
3F. Shamrao H.Jagtap.

4. Nathu alias Natha Maruti Jagtap .... Respondents.

Shri G.S.Godbole i/by Shri Dilip Bodake for the Appellants.

Shri H.D.Gole for the Respondents Nos.1(A)(a), 1(A)(c) to 1(A)(e), 1(B) and 1(C).

CORAM : ABHAY S.OKA, J.

DATED : 10th March, 2005.

ORAL JUDGMENT.

1. On April 4, 1983, the Second Appeal was admitted by passing the following order:

> "Admitted as there is a point of law which involved the question of partition."

It is obvious that at the time of admission of the Appeal substantial question of law was not framed. The

Second Appeal was admitted as this Court came to the conclusion that the substantial question of law was involved in the Appeal.

2. After hearing the parties by exercising power under Proviso to Sub-section (5) of section 100 of the Code of Civil Procedure, 1908 I have framed the following substantial questions of law:

(1) Whether the finding recorded by the Courts below on oral partition of the year 1958 is perverse ?

(2) Whether the Appellate Court committed an error by proceeding on assumption that during the lifetime of Ganpati, the Defendant No.1 must have acted as Karta or Manager of the Joint family and therefore, the lands described in Sr.Nos.1 and 2 in the plaint cannot be self acquired properties of the Appellant/Defendant No.1 ?

(3) Whether the Courts below committed an error by holding that the properties described in Sr.Nos.1 and 2 in the plaint were the properties of the joint family inasmuch as

the said properties were purchased during the lifetime of the father of the parties Ganpat in the year 1933 ?

I have heard the learned Counsel appearing for the parties on the aforesaid substantial questions of law.

3. Civil Application No.987 of 1983 was filed by the Appellant under Order XLI Rule 27 of the Code of Civil Procedure, 1908 seeking production of additional evidence. On 7th July 1997 this Second Appeal was heard and decided. At that time an order was passed on the said Civil Application by which the Application came to be rejected.

4. A Civil Application was filed being Civil Application No.8309 of 1998 for restoration of the Second Appeal. One of the grounds on which restoration was sought was that as a result of death of the sole Appellant there was abatement of the Appeal. The effect of the order passed on Civil Application No.8309 of 1980 is that the abatement of the Appeal was set aside. As a result of the abatement of the Appeal in fact there was abatement of Civil Application No.987 of 1983. Though there is no specific order passed on Civil Application No.8309 of 1998 restoring the Application No.987 of

1983, it is obvious that once the Second Appeal is restored, the said application for additional evidence will have to be considered on merits.

5. The Respondents Nos.1 and 2 are the original Plaintiffs. The Appellant is the Defendant No.1 and the Respondents Nos.3 and 4 are the other Defendants. The suit was filed by the Respondents Nos.1 and 2 for partition and separate possession of various properties described in the suit. Genealogy showing the relationship between the parties is as under:

Ganpat

! !

Laxmibai Laxmi

(1st wife) (2nd wife)

! (Plaintiff No.1)

--- !

! ! !

Shankar Hari Krishna

(Deft.No.1) (Deft.No.2) (Plaintiff No.2)

It is not in dispute that Ganpat died on 30th April 1941. The case of the Plaintiffs is that all the suit

properties are ancestral joint family properties and they were in joint enjoyment of the same. The case of the Plaintiffs is that the Defendant No.1 (Appellant) being eldest son in collusion with the Revenue Officers got separate entries made in the revenue records in respect of the suit lands and in Grampanchayat record in respect of the suit houses though there was no partition. The Plaintiffs contended that assuming that there was partition, the same was not equitable.

6. The suit was contested by the original Defendant No.1 and 2. Their case is that the land described in Sr.No.3 to 17 and 24 to 26 were admittedly ancestral properties. However, the said properties were partitioned in the year 1958. In the said oral partition 1/3rd share was allotted to the Plaintiffs and 1/3rd share each was allotted to the Defendants Nos.1 and 2. The case of the Defendant No.1 and 2 is that the properties described in Sr.No.1, 2, 18 and 19 are their self acquired properties. Their contention is that their maternal grand mother gifted her property to the Defendants Nos.1 and 2 and by sale of the said property, the Defendants Nos.1 and 2 acquired the properties at Sr.No.1 and 2 during the lifetime of deceased Ganpat. In so far as the properties at Sr.No.18 and 19 are concerned, according to the Defendants Nos.1 and 2 the

said properties were purchased in the year 1963-68 from the income of their sons who were serving at Bombay.

7. The Courts below after consideration of the evidence on record did not accept the theory of prior partition set up by the Defendants Nos.1 and 2. The Courts also did not accept the case made out by the Defendants Nos.1 and 2 that the properties at Sr.Nos.1, 2, 18 and 19 were their self acquired properties. Therefore, a decree for partition was passed by the trial Court and was confirmed by the Appellate Court.

8. Shri Godbole, the learned Counsel appearing for the Appellant submitted that the revenue record clearly discloses that there was a partition effected in the year 1958. He submitted that though some of the mutation entries might have been made on the basis of the "Phalani", still the basis of the said entries was partition. He submitted that by Civil Application for additional evidence, a case is made out for production of additional evidence in the form of "Phalni Patra" and record of rights. He submitted that the properties at Sr.No.1 and 2 in the plaint were self acquired properties acquired during the lifetime of the father Ganpat and therefore, the finding of the Appellate Court that the Defendant No.1 must have acted as Manager is

perverse as there is no factual foundation for the said finding. He submitted that since the said properties were acquired during the lifetime of the father Ganpat, in the absence of any case made out by the Plaintiffs that there was sufficient nucleus of the joint family property from which the properties could have been acquired by the Defendant Nos.1 and 2, the finding recorded by the Courts below is perverse. He submitted that as there was a prior partition in the year 1958, the subsequent acquisition in the year 1964-68 will have to be held as self acquisition by the Defendants Nos.1 and 2.

9. Shri Gole appearing for the Respondents Nos.1 and 2 has supported the impugned Judgments and Decrees.

10. In so far as the application for additional evidence is concerned, what is sought to be produced is the extract of the public record in the form of 'Phalni Patra" and the record of rights. The suit was filed in the year 1976 and the Appeal in the District Court was filed in the year 1981 which was decided in the year 1982. It is not the case made out in the Application for additional evidence that any attempt was made to get the documents which are sought to be produced by way of additional evidence either during the pendency of the

suit or during the pendency of the Appeal before the first Appellate Court. If the Appellants could produce various other documents such as mutation entries and the 7x12 extracts in the trial Court, it is very difficult to understand as to how the documents which are referred to in the Application for additional evidence were not attempted to be produced by the Appellants. Considering the fact that several documents were produced by the Appellants, it is very difficult to accept that they were not aware about the record of rights and other documents which they are seeking to produce now. Only a bald averment is made that the said documents could not be produced inspite of exercise of diligence is not sufficient to make out a case for production additional evidence under Rule 27 of Order XLI of the said Code. Hence there is no merit in the said Application and the same is rejected.

11. In so far as the plea of partition is concerned, it is to be noted that the Defendants Nos.1 and 2 have not stepped into the witness box. There is nothing on record to show that any Vardi (information) of the partition was givento the revenue authorities and on the basis of that, names of the parties were entered in the revenue records in respect of different lands. Admittedly there is no such mutation entry. The Courts

below have found that the names of the parties have been entered into the revenue records on the basis of different mutation entries. The Appellate Court has held that certain mutation entries have been recorded on the basis of the Phalni Patra and on the basis of the alleged oral partition. The Courts below have considered the very important circumstance that the lands were mutated in the names of different persons in two lots. Considering all this the Courts have not accepted the case of prior partition. The findings recorded by the Courts below on the issue of prior partition are based on consideration of oral and documentary evidence on record and there is no perversity in the said findings. Even assuming that a different conclusion can be drawn on the basis of the said evidence on record, the same is not a ground to interfere in a Second Appeal under section 100 of the said Code.

12. In so far as the properties at Sr.No.1 and 2 are concerned, the original Plaintiffs have approached the Court with the case that the said properties are ancestral properties. The said properties are admittedly acquired in the year 1933 i.e. eight years prior to the date of death of Ganpati. The specific plea of the Defendants Nos.1 and 2 is that a property

was gifted to them by their maternal grand mother and by sale of the said property the lands at Sr.No.1 and 2 were purchased. Apart from the fact that the alleged gift deed executed by the maternal grand mother is not produced, no particulars are given to show that the lands which were gifted by the maternal grand mother were sold on a particular date and a particular amount of consideration was received. In view of this factual position, the Courts below have not accepted the case of the Defendants Nos.1 and 2 that the lands at Sr.No.1 and 2 were self acquired properties. It is true that the Appellate Court could not have recorded a finding that the Defendant No.1 has acted as a manager. However, as the Defendants Nos.1 and 2 failed to establish the specific case made out by them, no fault can be found with the findings recorded by the Courts below that the Defendants failed to establish that the lands at Sr.Nos.1 and 2 were self acquired properties.

13. The acquisition of the lands at Sr.No.18 and 19 had taken place in the year 1963 and 1968. The Joint Family Properties were not partitioned as the Defendants Nos.1 and 2 have not proved their case of prior partition. It is obvious that large number of joint family properties were held by the Defendant No.1 and 2. The existence of sufficient nucleus as found by the Courts below is

therefore established. The Defendants Nos.1 and 2 have not stepped into the witness box for establishing their case. In the circumstances on the basis of evidence on record this aspect has been decided against the Appellant/ Defendant No.1.

14. There are concurrent findings of facts recorded by the Courts below and the findings are not shown to be perverse. There is no merit in the Second Appeal and the same is dismissed with no order as to costs.

15. At this stage a request is made by Shri Godbole that the interim order granted during the pendency of the Appeal be continued for a reasonable period. The request is rejected.

Judge.